

TELECOMMUTING

Introduction

Work and family issues, the drive for increased efficiency, environmental concerns about energy consumption and auto pollution, and improvements in technology have all served to increase interest in telecommuting. Although President Bush's Council on Management Improvement implemented a "Federal Flexible Workplace Pilot" (Flexiplace project) from 1990 to 1992, no information system was left in place to gather data on the success of the pilot.

In 1994, the Interagency Telecommuting Working Group established by the Clinton administration set a goal of increasing the number of federal employees participating in telecommuting to a level of 60,000 by FY 1998. The General Services Administration (GSA) estimated that satisfaction of this goal would generate savings to the government of at least \$150 million annually. These projected cost savings were generally based on reductions in the number of "dedicated workstations" in the principal office (including space, furniture and equipment). For example, GSA predicted that small field offices in many locations throughout the United States could be totally "replaced with home-based telecommuters."¹

While it is difficult to calculate the cost savings resulting from increased employee productivity, GSA notes, telecommuting would probably produce a more efficient use of time in the federal government, therefore translating to better customer service and a "better ability to get things done."

According to President's Management Council, a benefit of equal, or perhaps greater value, is the ability of telecommuting arrangements to promote a better balance between work and family needs. Among other things, many employees would save several hours of commuting time through the use of these types of arrangements; this saved time could then be devoted to personal needs with no cost to the government. This time, and the additional time that might be available through greater flexibility in scheduling work, could be used for a greater level of community and charitable involvement.²

Among the social benefits noted in the various reports by the federal government is the ability to use telecommuting to accommodate many workers with disabilities or illness. Additionally, workers who are charged with caring for the disabled and seriously ill could use these arrangements to their and the public's benefit (families could provide some of the services now rendered by government). An obvious benefit to families is the ability of parents to provide direct care of children and the elderly. While many studies caution that telecommuting arrangements cannot be viewed as a way to provide child care, each generally notes many advantages to children, elderly and other family members that result from these working arrangements.³

Other social benefits that may accrue, observed the writers, are reductions in energy consumption and a corresponding improvement in air quality. Significant reduction in traffic congestion is noted as "possibly" resulting from telecommuting; with this would also come

fewer traffic-related deaths and accidents on the roads, and significant reductions in the carbon emissions that are generally credited with the trends in global warming that have been observed by some scientists.⁴ Ultimately, each of these social benefits will lead to possible reductions in burdens currently funded by taxpayers.

Telecommuting Issues

Initial telecommuting issues relate to the employee's access to adequate technology, the responsibility for breakdown or damage to equipment, and liability for energy and utility costs. The next hurdle is establishment of performance standards. Another issue is the reluctance of managers. At heart may be a natural reluctance to try techniques that are new and have questionable results, but managers can easily identify a number of legal problems that could result from their use of telecommuting. Among these are payroll problems because of record keeping difficulties, problems with the union and safety, health and liability concerns. These are all very significant problems that the GSA minimizes or does not address in its report.⁵

Urban and central city residents argue that telecommuting and other forms of distributed work will take jobs and economic activity away from downtown areas.⁶ Chief among these concerns are that telecommuting would contribute to further decline in urban areas, and further segment society into classes, with the lower class left to dwell in the abandoned inner-city areas.

Another concern is that the new work system will upset current labor relations practices in the United States. For instance, unions are concerned that the movement of workers from the principal workplace to alternative locations, including the worker's home, will challenge the ability to effectively represent them. Among these representational concerns is the ability to organize workers and the potential that employers will use this new technology as a means to exploit workers. Another is the use of piecework wage payments, i.e., workers being paid based upon productivity rather than traditional hours of service. The unions are concerned that safety and health protections will be compromised, that career employee status may be changed to contract employee status and that full-time jobs will become part-time and/or temporary. Additionally, unions voice concern over equity issues, such as seniority based systems being replaced by performance measures.⁷ Telecommuting also raises issues such as whether a union will be permitted to contact an employee through e-mail transmissions.

The Possible Legal Obstacles to Telecommuting Arrangements

Most state workers' compensation statutes provide for employer liability whenever an injury occurs, provided that the injury occurs in the course of employment and is related to employment.⁸ In the area of telecommuting, workers' compensation insurers are increasingly concerned because of fears that these arrangements are ripe for fraudulent claims.

For instance, jurisdictions such as Maryland, Ohio and Washington state cover all accidents that occur during “working hours” while others such as Alabama, New York and Virginia require an employee to demonstrate that the injury was sustained in the course of employment. Whether the employee was injured in the home office proper or in another room of the home during telecommuting hours could therefore affect a coverage decision. For instance, an employee who burns herself with scalding coffee while taking a personal phone call in the kitchen may receive a different coverage decision, depending on the state in which the accident occurred.⁹ In other cases, the concern is more fundamental; that these compensation claims are difficult to corroborate because of a lack of witnesses and that many of these cases will be litigated before issues such as causation, course of employment and other matters can be settled.

Related issues concern the employer's responsibility for injury to third parties that may occur at an employee's home during work hours. For instance, if a visitor is injured at the employee's home office, is the employer liable? Is the correct legal standard for a case resulting from such an injury the liability laws applicable to commercial premises, or the law applicable to personal dwelling structures? Also, does the employer bear any liability in situations where a family member of one of the telecommuting employees is injured in the office area? Would it make a difference if the employer had installed the equipment? Would it make a difference if the employer conducted regular inspections of the employee's home office? Does an employer leave itself open to a charge of negligence if it does inspect the home office and misses some defect in equipment that could cause injury?

Occupational Safety and Health and related state statutes require that an employer provide a workplace free from hazards that are likely to cause serious harm or injury.¹⁰ Generally, the statutory definitions of “place of employment” have been broadly defined, at minimum, leaving a question as to whether telecommuting working arrangements between an employer and employees are subject to some or all of the standards and regulations.

The Fair Labor Standards Act was passed to improve “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and the general well-being of workers.” With telecommuting, the applicability of these requirements can become tangled. One such area is the employer obligation to maintain records of employee hours worked, so that compensation meets minimum wage and overtime pay requirements. Such record keeping is complicated when the hours worked are at an employee’s home or other location.¹¹

The Americans with Disabilities Act requires employers to provide reasonable accommodation for the known disabilities of employees.¹² The ADA does not provide an explicit definition of what the term reasonable accommodation means, but instead lists the types of modifications that may be required.¹³ In addition, the ADA specifies that an employer is not required to make an accommodation if it requires restructuring the essential functions of the position, or if the accommodation requested is not one that would enable the employee to perform the essential functions of the job, even if it were made.¹⁴ Accordingly, in the vast majority of cases, whether or not telecommuting will be a reasonable accommodation will fall in the gray area between these two statutory guidelines. This vagueness will leave most employers who institute telecommuting arrangements with employees open to litigation.

The Family and Medical Leave Act of 1993 (FMLA)¹⁵ guarantees eligible employees up to 12 weeks unpaid leave in one year for specific family and medical reasons.¹⁶ FMLA applies to private and public employers if the employer has 50 or more employees, including part-time, within a 75-mile radius during each of 20 or more calendar weeks of the year. The problem with the interaction between the FMLA and telecommuting arrangements is that employers may desire to use telecommuting as a way to avoid losing an employee for 12 weeks. How will the two purposes mesh?

Employer fears in the area of Equal Employment Opportunity and Affirmative Action stem from choosing the employees to participate in any telecommuting arrangement. In situations where a given employee may not be permitted to participate, the danger is that the employee will charge that the denial is in retaliation for some other action.¹⁷ In addition, employers realize that there is little control over an employee's use of technology from a remote location. Lawsuits have been filed based on an employee sending, via e-mail, materials that may be addressed under the company's sexual harassment policy.¹⁸

The telecommuting employee must engage in a great deal of preparation, and possibly expense, before an employer may allow the employee to participate. Could this expenditure of time and effort give rise to an expectation of continued employment by the employee? And, could this counter a potential at-will employment termination based on the grounds that the telecommuter relied on a promise of continued employment?¹⁹

Most employers have guidelines to protect private and confidential information. But will these policies become strained when an employee takes information home? More importantly, what steps can an employer take to monitor compliance with these policies and what related concerns may arise in terms of employee privacy? Additionally, the laws protecting employee privacy rights and employer monitoring rights are ambiguous, and issues such as e-mail privacy are already on the rise. This leads to a Catch-22 of sorts where the employer is expected to prevent offensive statements from being circulated in the workplace, but runs the risk of infringing upon employee privacy rights while doing so.

Other potential legal questions such as local zoning and land use requirements arise, as do questions about requirements for local and state business licensing and registration procedures. Obvious insurance questions regarding coverage of employees, accidents and property at remote sites, and whether existing coverage is adequate, are also of concern. In addition, telecommuting raises questions on federal, state and local tax treatment of both income and sales.

Telecommuting in the Government

As of 1996, there were 400 federal employees working at 11 telecenters and another 3,000 plus employees telecommuting from home one or two days per week. The federal government is far behind in meeting the Administration's goal of 60,000 telecommuting employees by the end of FY 1998.

According to American Worker Project research, many federal agencies could enjoy cost savings from telecommuting. For example, the Occupational Safety and Health Review Commission has many positions which could readily be handled by telecommuting. Such arrangements could reduce the Commission's space requirements - currently close to \$1 million per year - by one-half or more.

Findings and Recommendations

- The Education and the Workforce Committee should begin a series of hearings into the use of telecommuting arrangements in private sector employment. These hearings should be followed by a comprehensive assessment of the legal obstacles encountered by employers who seek to use these work arrangements to improve their productivity and better serve their employees. If necessary, appropriate legislation should be drafted to facilitate these work arrangements.
- Congress should insist that the federal government proceed with the feasibility study on telecommuting and flexible work arrangements in the federal sector that was begun over a decade ago. Congress should establish a completion date for publishing this study and making it available to the public.

¹ President's Management Council, NATIONAL TELECOMMUTING INITIATIVE ACTION PLAN, January 1996.

² Id.

³ Id.

⁴ Id.

⁵ FEDERAL INTERAGENCY TELECOMMUTING CENTERS INTERIM REPORT, *supra*.

⁶ FEDERAL INTERAGENCY TELECOMMUTING CENTERS INTERIM REPORT THROUGH 1994, GSA, 1995

⁷ See: Interagency Telecommuting Program, *Overview of Telecommuting Today*, U.S. Department of Transportation and U.S. Government Services Administration, March 1995.

⁸ See, e.g., Maryland Workers' Compensation Statute, Md. Code Ann., Lab & Empl. Sec. 9-101

⁹ Helen R. Stewart, *Out of Sight, Out of Mind: Legal Issues in Telecommuting for Your Business Client*, Helene R. Stewart, NOV/DEC Business Law Today 1996.

¹⁰ 29 U.S.C. §654

¹¹ 29 U.S.C. §211©

¹² 42 U.S.C. §12112(b)(5)(A)-(B)

¹³ 42 U.S.C. §12111(9)(A)-(B)

¹⁴ 29 CFR §1630.2(o) (explaining that the essential functions are by definition those that the individual who holds the job would have to perform).

¹⁵ 29 U.S.C. §2601 et seq.

¹⁶ Under the FMLA, this 12 weeks need not be taken continuously, but may be on a intermittent or reduced leave basis.

¹⁷ Equal Employment Opportunity Commission. *Addy v. Bliss & Glennon*, 51 Cal. Reprtr. 2d 642

¹⁸ *Bryant v. National Science Foundation*, 105 F. 3d 1414

¹⁹ Helene R. Stewart.